United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1941

To be argued by
PAUL E. COFFEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1941

UNITED STATES OF AMERICA,

Appellee,

—v.—

NICHOLAS ZINNI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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Citation of Statutes

§ 241. Conspiracy against rights of citizens.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any terms of years or for life.

As amended April 11, 1968, Pub.L. 90-284, § 103(a), 82 Stat. 75.

Obstruction of Justice 18 U.S.C. 1503

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . or injures any party or witness in his person or property on account of his attending or having attended such court . . . or on account of his testifying or having testified to any matter pending therein, . . . or corruptly or by threats or force, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As amended Oct. 17, 1968, Pub.L. 90-578, Title III § 301 (a) (1), (3), 82 Stat. 1115.

Explosive Materials 18 U.S.C. 844

(h) Whoever—

(1) uses an explosive to commit any felony which may be prosecuted in a court of the United States or . . . shall be sentenced to a term of imprisonment for not less than one year nor more than ten years.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1941

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BRIEF FOR THE APPELLEE

Statement of the Case *

On June 14, 1973 a federal grand jury in Hartford, Connecticut returned a three-count sealed indictment against David Guillette, Robert Joost, William Marrapese and Nicholas Zinni charging them with a conspiracy to deprive Daniel LaPolla, a federal witness, of a civil right guaranteed to him by the United States Constitution or by the laws of the United States, in violation of Section 241, Title 18, United States Code. The grand jury charged that LaPolla's death resulted on September 29, 1972 as a result of this conspiracy. The grand jury also charged that all four defendants violated Sections 1503 (obstruction of justice) and 844(h)(1) (unlawful use of explosives in the commission of a felony), of Title 18, United States Code, arising out of

* References to the trial transcript will be "Tr—". References to Appellant's Brief will be "Brief, p.—".

the use of a dynamite bomb to kill LaPolla. On June 15, 1973, bench warrants were issued. As Joost and Guillette could not afford counsel, the Honorable T. Emmet Clarie, now Chief Judge, District of Connecticut, appointed lawyers to represent Joost and Guillette. Andrew A. Bucci, an attorney from Providence, Rhode Island, entered an appearance for Marrapese, and his law associate, John A. O'Neill, Jr. entered an appearance for Zinni. Extensive motions for discovery and inspection, as well as motions addressed to the indictment and motions to dismiss, were filed on Zinni's behalf in June, 1973.

During discovery proceedings in July and August, 1973 the government disclosed, *inter alia,* physical evidence and expert reports in its possession. On September 21, 1973, a three-day suppression hearing began, centering on searches conducted on premises owned by Guillette. On October 19, 1973 Judge Clarie denied all motions to dismiss and denied in part and granted in part the motions to suppress. A motion by O'Neill to withdraw as appellant's counsel was also denied. On October 24, 1973, minutes before jury selection was to begin, Judge Clarie granted a motion to sever the case against Marrapese and Zinni. Marrapese was still represented by Andrew A. Bucci even though the government had notified all defendants that one of the government's key witnesses was going to testify that Bucci attended a meeting at which LaPolla's murder was plotted. On January 10, 1974, Joost and Guillette were convicted on all counts and, on March 7, 1974, they received life sentences on the conspiracy count and concurrent ten and five year sentences on the remaining two counts. On March 21, 1973, in a sealed opinion, Judge Clarie disqualified Bucci from further representation as counsel for Marrapese. Attorney Raymond J. Daniels, Esquire, then entered his appearance for Marrapese. C. Thomas Zinni, Esquire, entered his appearance for his brother, and Mr. O'Neill, who testified as an alibi witness in the Joost-Guillette trial, withdrew his appearance for Zinni and reappeared as co-counsel

for Marrapese. A motion for change of venue was granted by Judge Clarie and the case was assigned for trial in late May, 1974 before the Honorable Thomas F. Murphy at Waterbury, Connecticut. Trial began on May 29 and ended on June 12, 1974 with a conviction on all counts against both defendants. On June 26, 1974, both received life sentences identical to those imposed on Joost and Guillette. Shortly thereafter, in September, Marrapese and Zinni filed motions for a new trial based on newly discovered evidence and prosecutorial suppression of evidence. Judge Murphy held an evidentiary hearing on these motions on September 5-6, 1974 and subsequently denied the motions in a written opinion on October 24, 1974.

Statement of Facts

The Government's Case

On November 21, 1971, thirty M-16 automatic machine guns were stolen from the Westerly, Rhode Island National Guard Armory (Tr. 825). On January 25, 1972, twenty-nine of these weapons were recovered in a water-filled stone quarry (Tr. 92-93). The weapons were stolen, and recovered without bolts. Recovery of the weapons resulted from the cooperation of Daniel LaPolla (Tr. 88, 94), who became the government's informant in the case (Tr. 826). On March 31, 1972, LaPolla wore a body transmitter into American Universal Gold Buyers, Inc. (hereinafter "A.U. G.B."), a precious metals business operated by William Marrapese in Cranston, Rhode Island (Tr. 171, 827). LaPolla spoke to, among others, two individuals who later turned out to be Marrapese (Tr. 107, 251-252, 830) and Zinni (Tr. 107, 250, 253). LaPolla told Marrapese that he had a buyer for the rifles—a buyer who thought he could get the needed bolts.[1] Marrapese set a price of $100 a piece

[1] *See, United States* v. *Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, *415* U.S. *994* (1974). In its opinion, this Court set

[Footnote continued on following page]

and, after Zinni inquired "He wants to buy the rifles?" LaPolla inquired if Marrapese would get "Bobby" or "Davie" to go down to retrieve the weapons. The weapons had originally been stored in LaPolla's bedroom (Tr. 10) before they were dumped in the quarry a mile and a quarter from his home (Tr. 88). Marrapese told LaPolla that he'd get "someone down there" to retrieve the weapons. Marrapese then asked LaPolla where Brooklyn, Connecticut was. When LaPolla asked why, Marrapese went on to indicate that "they got all kind of witnesses" at the Brooklyn jail, that "we figure if the whole joint goes, we're guaranteed to get him" and, finally, "we got eight sticks . . . I'm going to take him off". (See Transcript of Conversation, Government Exhibit #35).

A loud noise on the tape is heard and then Marrapese said to LaPolla, "that's what you'll hear, Dan". Zinni again indicates his presence by then ordering a cup of coffee. Outside A.U.G.B. premises, I.R.S. Special Agent William Smith and A.T.F. Special Agent Salvatore Petrella monitored and recorded the entire conversation.

As a result of his cooperation, LaPolla was relocated out of the Oneco, Connecticut area in April, 1972 (Tr. 147). He returned to Hartford, Connecticut on May 3, 1972 to testify before a federal grand jury concerning his knowledge of the M-16 case (Tr. 148, 837). As a result, an indictment was returned the same day charging Joost, Guillette, Marrapese and Zinni, with three counts, of the interstate transportation, possession, concealment and storage of

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out the full transcript of the conversation of March 31, 1972 as it related to the stolen weapons. In the instant case, the same tape and transcript were authenticated outside the presence of the jury (Tr. 103-111, 833-835). The government introduced in this case additional comments between Marrapese and LaPolla, in Zinni's presence, on March 31, 1972 concerning Marrapese's possession and intended use of dynamite. This is discussed more fully, *infra* at p. 29.

the M-16s. The four defendants were also charged with conspiracy to commit these offenses; the conspiracy count specifically charged that the weapons were transported to LaPolla's Oneco residence and stored in his bedroom.

Early on the morning of May 4, 1972, the four defendants were arrested at their respective residences by federal agents. When agents entered Guillette's residence at 169 Messer Street in Providence, they observed John Housand in the living room (Tr. 317). Housand was a much convicted (Tr. 282) felon who later testified that he had arrived in the Rhode Island area on April 18, 1972 (Tr. 290) and met Joost and Guillette on April 21st (Tr. 295). Guillette and Housand quickly became friends (Tr. 297) and Housand had occasion to visit Guillette's residence on several occasions (Tr. 296). Guillette had a basement workshop filled with electronic equipment and burglar alarm equipment with which he and Housand had experimented (Tr. 309). Shortly after his arrival in Rhode Island Guillette introduced Housand to the appellant at A.U.G.B. Zinni told Housand that any friend of Guillette's was a friend of his (Tr. 299). In late April, 1972, Housand and Guillette burglarized a trailer in Manville, Rhode Island and took a box of dynamite and blasting caps (Tr. 302). Housand had previously visited the trailer and had seen the dynamite (Tr. 293), and had mentioned that fact to Guillette. On April 27, Housand, Joost and Guillette were arrested for a local offense in Rhode Island and, on the next day at Carter's jewelry store (a business which shared premises with A.U.G.B.), the appellant told Housand, in Guillette's presence, that he had handled himself well with the police and that they could always use a good man. As a result of his friendship with Guillette, Housand was an overnight guest of Guillette's on the morning of the latter's arrest (Tr. 316). As Guillette was driven off by the agents, Housand called both Joost, too late as it turned out, to warn him (Tr. 318), and Andrew A. Bucci, a Providence attorney who had previously entered an appearance for

Housand for the aforementioned April arrest (Tr. 1285-1286). Housand then drove Guillette's wife, Pat, Joost's girfriend (Jane Luzon), and a girl named Ida Cochran to the federal building in Hartford, Connecticut, where the four defendants were scheduled for a presentment before a United States magistrate. While the defendants were waiting for their presentment in two adjacent cells in the United States Marshal's Office they were visited by Bucci (Tr. 1235), who had secured a copy of the charges which he read to them (Tr. 1283). He also told them that in his opinion LaPolla was going to be a government witness because LaPolla was also named but not charged in the indictment (Tr. 1283-1284). Bucci also testified unequivocally that he got into a heated argument with Petrella prior to the presentment (Tr. 1280); in fact he did not talk to Petrella at all that day (Tr. 1417). The defendants were released on bail late in the afternoon of May 4th (Tr. 322). As the defense group was waiting for an elevator, Housand was introduced to Marrapese by either Joost or Guillette (Tr. 323). On the ride back to Providence, in a group consisting of Joost, Guillette, Housand, and the three women, Joost and Guillette discussed the truck they had used in the "Armory job" (Tr. 324). Guillette noted to the group that LaPolla, according to Bucci, was the government's only witness (Tr. 325). Joost suggested "'whacking out" both LaPolla and Edward Sitko, a person who had drawn Joost's ire because he had failed to get rid of the truck used in the Armory break, Housand observed that LaPolla had probably made a deal for immunity and was stashed away (Tr. 326). Either Joost or Guillette indicated that Bucci was already in the process of locating LaPolla (Tr. 326). Shortly thereafter, the group stopped in Plainfield, Connecticut at the "P&M" Restaurant (Tr. 327). In the absence of the women, Joost or Guillette asked Housand if he would kill LaPolla (Tr. 328). Housand indicated he would for $5,000 (Tr. 329). Joost and Guillette responded that it was a fair price, but they would have to discuss the matter with "Nick and Billy" (Tr. 329).

On Sunday, May 7, 1972, Guillette called Housand and told him to meet him the next day around 9:00 a.m. so they could talk to some people (Tr. 335). On Monday, May 8th, roughly sometime between 9:00 a.m. and 12:00 noon (Tr. 415), Housand and Guillette drove to Carter's Jewelry Store, were allowed entry through the front door by Lou Carter (Tr. 336), proceeded to a room located behind Carter's and participated in a meeting with Joost, Bucci, Marrapese and Zinni (Tr. 338). Guillette told the others that Housand had agreed to take care of LaPolla for $5,000 (Tr. 340), indicating that Housand was a good choice since he was not known in the New England area (Tr. 341). Guillette asked if it was a fair price and Zinni and Marrapese agreed (Tr. 342). Marrapese additionally stated that LaPolla had "to go" since he (Marrapese) already had problems with the government (Tr. 342). Bucci said very little except that, when asked by Joost if he had located LaPolla, he responded, "LaPolla's the only government witness". The meeting, which only lasted fifteen minutes (Tr. 345, 414) broke up and Housand departed with Guillette. Bucci asked Marrapese for a ride downtown since he had problems with his Jaguar automobile (Tr. 345). Later that evening Housand was given a "clean gun" by Guillette at Sitko's residence in Woonsocket, Rhode Island (Tr. 346). Housand never did kill LaPolla; he left the State of Rhode Island on June 13, 1972 (Tr. 348) after falling out of the good graces of Guillette. Housand had received a physical beating in late April which he attributed to Guillette (Tr. 445). He complained to an F.B.I. agent about the beating, but did not disclose the plan to kill LaPolla (Tr. 446). At the time of LaPolla's murder, Housand was in jail in Raleigh, North Carolina and had been incarcerated continuously there since July (Tr. 347).[2]

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[2] In return for his testimony, Housand testified that he had been given immunity from his role in the entire LaPolla matter which he disclosed to federal authorities, subsistence payments at

[Footnote continued on following page]

Immediately following the arrests on May 4, 1972 the location of LaPolla became the primary consideration in the preparation of the defense case (Tr. 1301-1302). Bucci asked all the defendants, including the appellant (Tr. 1300), to find LaPolla.[3] On one occasion, during the summer of 1974, Bucci and Marrapese drove to Oneco, Connecticut in an attempt to locate LaPolla, but were unsuccessful. However, they did drive past both his home and the quarry (Tr. 1260). LaPolla, in fact, had been relocated, although his residence was periodically checked by agents Smith (Tr. 150) and Petrella (Tr. 838). On July 26, 1972, Marrapese paid a visit to Mrs. Ann Kiley, LaPolla's sister, in Providence (Tr. 626). He attempted to create the impression that he was a federal agent (Tr. 627). When this ruse failed, he informed Mrs. Kiley that he was going to subpoena her other brother, Rev. Angelo LaPolla, a Catholic priest, for information about Daniel and, if that failed, he'd subpoena someone from the chancery office of the diocese. Marrapese next visited Alfred Marafino, who had

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$85 per month while in prison, amounting to approximately $1,000 (Tr. 286-287), and a promise that his cooperation would be made known to North Carolina parole authorities (Tr. 363). Although he did not make parole when he first became eligible in January, 1974 (Tr. 541-542), he was granted parole several months later, at which time he was given $2,160 by the United States Marshal's service as expenses to relocate him, a place to live, a means of transportation and a new identity (Tr. 543). Defense counsel attacked Housand's veracity by showing his frequent use of lies and deceit in a life of crime (Tr. 453) and a number of inconsistencies between his trial testimony and statements he had previously given to federal authorities. For example, he did not mention to the grand jury that Bucci was present at the May 8, meeting (Tr. 449) nor, in a statement of April 19, 1973 was there any mention of the May 8 meeting (Tr. 545). Housand also admitted that when he met the appellant on April 24, 1972, he originally thought that person's name was Marrapese (Tr. 510).

[3] Bucci testified that he is a strong believer in client participation and generally has his clients do their own investigations (Tr. 1261-1262).

married LaPolla's ex-wife. He told Marafino that he wanted information about LaPolla from his wife (Tr. 603). When Marafino refused, Marrapese said he could make it hard on Mrs. Marafino and her son if he didn't get what he wanted (Tr. 604). Within days after the Kiley visit, Bucci also hired a private investigator, Robert Joyal, to conduct surveillances of LaPolla's home (Tr. 925). While in Bucci's office, where he was soliciting work, Joyal was given a description of LaPolla and his car by Marrapese (Tr. 947). Despite nine days of surveillances, some of which were in the dead of night (Tr. 938), Joyal was unsuccessful. Although August was quiet, with respect to efforts to locate LaPolla, September proved eventful.

On September 7, 1972, Petrella and fellow A.T.F. agent James Watterson were on one of their routine checks of the Oneco area when they noticed a car parked near LaPolla's home (Tr. 839). When the agents stopped several hundred yards in front of the vehicle, in order that Petrella could check the license number, the suspect car made a sudden U-turn, complete with squealing tires, and roared off. A high speed chase resulted, but the car eluded the agents (Tr. 840). The car proved to be registered to Marrapese's wife (Tr. 665). On September 22, two weeks later, Guillette and Joost hired James Burns, a commercial pilot, to fly Guillette over LaPolla's home, and the surrounding area, while Joost drove around below them in his car (Tr. 795). Joost and Guillette communicated by means of a walkie-talkie (Tr. 791). Guillette also was armed with binoculars and a camera. Guillette told burns that they were looking for a guy in a white Chevrolet (Tr. 793)[4] who had extorted money from one of his friends (Tr. 794). Guillette said that he and Joost were attempting to serve papers on this individual. The flight, which lasted an hour and a half, was unsuccessful in locating LaPolla, although at one point a white Chevrolet was seen (Tr. 798). Guil-

[4] LaPolla, in fact, did own a 1963 white Chevrolet (Tr. 87).

lette indicated, after the aircraft swooped down over the vehicle, that it was the wrong car (Tr. 798). On the next day, Guillette and Joost rented an aircraft flown by Roger Williams (Tr. 806). Joost and Guillette gave Williams the same story they had given Burns (Tr. 808-809). As Williams flew over Oneco (Tr. 812; Government Exhibit #95, an aerial photograph of the area), he could see Joost hiding in a treeline several hundred yards from LaPolla's home (Tr. 810). Nothing eventful happened immediately and Williams flew the aircraft to Danielson, Connecticut Airport for a "nature call". When Williams and Guillette returned, they heard the voice of a very excited and angry Joost (Tr. 815). Joost informed them that he had been seen (Tr. 816). "He must have recognized me!", Joost exclaimed. Joost had seen LaPolla standing in his front yard as he drove by (Tr. 816). Significantly, he did not stop or attempt to serve any "papers" (Tr. 816). Guillette instructed Williams to fly around the area, but although several white Chevrolets were seen, none belonged to LaPolla (Tr. 817). Guillette told Williams that the individual they were looking for usually went to his residence every day at approximately 2:30-3:00 p.m.[5] When the flight was completed, Guillette and Joost told Williams that they intended to return to Oneco on motorcycles (Tr. 818). On the same day in Providence, an event which had significant ramifications occurred. Angelo LaPolla, Daniel's brother and a Catholic priest, died of natural causes (Tr. 631). A public wake was held for Angelo's parishioners at Holy Ghost Rectory on September 25, 1972 in Providence (Tr. 152). At approximately 6:00 p.m., Agents Watterson and Smith, who were at the Rectory, observed Joost and Guillette drive past (Tr. 154, 671). They parked a short distance away and began walking towards the Rectory, but upon seeing the approach of Agents Petrella and Watterson, they turned and briskly walked in the opposite direction (Tr.

[5] The dynamite blast that killed LaPolla occurred shortly before 3:00 p.m. on September 29, 1972.

672, 844). Joost and Guillette ducked in a corner restaurant and then bolted out a side door and down a dead end alley with the agents in pursuit (Tr. 673, 844). Petrella warned the two defendants of the consequences of an intimidation of a witness (Tr. 844) and then returned with Watterson to the Rectory. At this time, they observed Marrapese, who had arrived in his gold Cadillac (Tr. 846). Petrella gave a similar warning to Marrapese. Within forty-five minutes, Bucci arrived (Tr. 158, 847) and engaged Marrapese in conversation. Both Marrapese and Bucci then attempted to gain entry into the Rectory (Tr. 848), which was denied initially. Finally, Bucci was allowed entry, despite the fact that he was loud and boistereous and had attempted to shove Petrella aside (Tr. 159). As Bucci entered, Marrapese said, "He's bald and wears thick glasses". This was a description of LaPolla (Tr. 160). Once inside, Bucci looked around without paying his respect to the deceased (Tr. 636) and then departed. He immediately engaged Marrapese, Joost and Guillette in conversation (Tr. 850). Zinni was not observed in the area during this time.

On September 26, 1972, the next day, as Rev. LaPolla lay in state in Holy Ghost Church, Marrapese appeared unexpectedly on the church steps, causing the LaPolla relatives to retreat into the church and call the police (Tr. 639). On September 27, 1972, Rev. LaPolla was buried in Providence. As the mourners departed the cemetery, Joost and Guillette were observed off in the distance walking among the gravestones (Tr. 278). Meanwhile, on the same day Marrapese paid another visit to Oneco, this time to the quarry where he inquired of a young woman about guns having been found there (Tr. 618).

On September 29, 1972 in mid-afternoon, Daniel LaPolla[6] returned to his home despite specific instructions by

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[6] The parties stipulated that LaPolla was an American citizen (Tr. 4), an element of the civil rights count.

Agent Smith not to do so (Tr. 163-164). As he opened his front door he was instantly killed by a dynamite bomb that completely destroyed his home. The reconstruction of the bomb device showed that the triggering device was placed on the floor inches inside the front door so that an opening of the door caused an electrical circuit to close and detonate the dynamite (Tr. 74-75). It was stipulated that LaPolla did not place the bomb himself (Tr. 52, 84). Partial latent fingerprints were found on components of the bomb, but a Connecticut State Policeman testified that the prints did not belong to either Marrapese or Zinni (Tr. 800-801). On the evening of the bombing, a characteristically nervous Marrapese (Tr. 573) went to the Cranston, Rhode Island Colonial Hilton with one George Henebury. Bucci (Tr. 575) and Joost (Tr. 279) were also at the Colonial Hilton the same night. Marrapese stayed overnight in a hotel room registered to Henebury (Tr. 576) even though he lived only five miles away (Tr. 577). Within a few days after the bombing, Guillette called Roger Williams, the pilot, mentioned the fact that his name was in the papers and told Williams, "Don't say anything" about the plane ride (Tr. 819).

As corroborative proof that Guillete had the expertise to operate and/or manufacture the bomb, it was shown that Guillette had extensive electrical paraphernalia in his basement and a self-installed burglar alarm system[7] (Tr. 58, 61-63). Hemlock wood, used as part of the bomb, was also found in Guillette's cellar (Tr. 64).

The Defense Case

The defense case, in which neither defendant testified, centered around an attempt to discredit John Housand's testimony by alibi witnesses and an attempt to legitimatize efforts by the M-16 defendants to locate LaPolla. Andrew

[7] A government bomb expert, Albert Gleason, testified that the Oneco bomb apparatus was an anti-intrusion device (Tr. 81).

A. Bucci provided the nexeus. Bucci admitted that he told all four defendants on May 4, 1972 that LaPolla was a government witness (Tr. 1257). He denied he attended the conspiracy meeting of May 8th, claiming instead that he was in Providence Superior Court from approximately 10:00 a.m. until 12:00 noon (Tr. 1241; 1253). He admitted that he went with Marrapese to locate LaPolla in Oneco sometime after the M-16 arrests occurred (Tr. 1258). He admitted hiring Joyal to locate LaPolla (Tr. 1263-1264) and conceded that he was at the Holy Ghost Rectory on September 25, 1972 at which time he was confronted by Agent Petrella (Tr. 1265). He also testified that he instructed Marrapese to stay at the Colonial Hilton on the evening of September 29, 1972 (Tr. 1271) in order to make a "final determination" of what to do with him (Tr. 1271). Bucci testified he had seen Housand only twice in his life, once on May 4, 1972 and once at a bind-over proceeding in late May in Pawtucket, Rhode Island (Tr. 1238). Bucci, a close personal friend of Marrapese's for twenty years (Tr. 1278), testified that prior to Daniel LaPolla's death he had several discussions with Marrapese about the admissibility of the tape recorded conversations between LaPolla, Marrapese and Zinni. He claimed he told Marrapese that the tapes were admissible and LaPolla need not testify for the government to prove its case (Tr. 1344), although he also said he did not know if either Marrapese's or Zinni's voice was on the tapes (Tr. 1353-1354). He discussed with Marrapese the possible absence of LaPolla as a government witness (Tr. 1354-1355).

With respect to the May 8th alibi, the defense produced eight witnesses to place Bucci in Providence Superior Court that morning. Justice John McKeirnan, and Paul Rocheleau, his stenographer, both recalled Bucci's presence in court that day (Tr. 1088, 1071), but neither had any independent recollection of the time of the morning (Tr. 1090, 1983 respectively). The court clerk, Thomas Luongo, only recalled that there were trials pending against Mar-

rapese and others scheduled for call that day (Tr. 1065). John Kelly, a member of Bucci's law firm, recalled Bucci's appearance in chambers shortly after 10:00 a.m. (Tr. 1100). Carmen Rao, another member of Bucci's law firm, recalls Bucci in court after the conference in chambers and up through jury selection of a case Rao was trying (Tr. 1112-1113). John Sheehan, another attorney, recalled only the conference in chambers (Tr. 1124). The state prosecutor, Edward Mulligan, recalled the in-chambers conference, in which Bucci participated (Tr. 1138), and recalled picking a jury with Mr. Rao and putting on his first witness (Tr. 1141). He had no recollection of Bucci's attendance at that time. Julio Fuina, a Providence detective assisting Mr. Mulligan, recalled Bucci's attendance in court (Tr. 1020) and recalled jury selection finishing at 11:52 a.m. on May 8, 1972. Contrary to Bucci's claim that he stayed in the courtroom once jury selection began until the lunch recess (Tr. 1252-1253), Fuina specifically recalled seeing Bucci stand up and leave during the proceedings without returning (Tr. 1049). There were no witnesses to corroborate Bucci's claim (Tr. 1240) that prior to 10:00 a.m. he walked from his office to court with Attorney John O'Neill, who did not testify. Bucci said that Marrapese and Zinni were in the Superior Courthouse on May 8th (Tr. 1254-1255) sometime after he arrived. This testimony placed Marrapese, Zinni and Bucci together in a location only fourteen minutes from Carter's Jewelry Store (Tr. 994).

Also called by the defense were several witnesses who testified to a burglary which had occurred at Carter's jewelry store on May 4, 1972 and to the physical appearance of the jewelry store as of May 6th.[8] Doreen Corrente,

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[8] Housand testified that he noticed on May 8, 1972 that the front room of Carter's was in disarray with most of the stock gone, but with some cartons or boxes still on the floor (Tr. 337-338). On cross-examination he responded "Yes, it was quite bare", to a question as to whether the stock and cases had been cleaned out (Tr. 522).

an employee, recalled that the stock was removed on May 6th, as well as a desk and chairs in Carter's back room. Louis Iadimarco, also known as Louis Carter, a convicted felon, also testified that the furniture in the back room and everything but a showcase in the front room had been removed (Tr. 1211). He indicated, however, that if one went through a second door there was an adjacent back room belonging to A.U.G.B. which did have a desk (Tr. 1214). Although Housand testified that the May 8th meeting occurred in a room to the rear of Carter's display area, the effect of Corrente's and Carter's testimony, that Carter's back room had no furniture as of May 8th was dissipated by Housand's testimony that he traveled with Guillette through *two* doors to get to the back portion of the *building* (Tr. 338; 523). Moreover, the defense witnesses corroborated Housand's testimony that he was in Carter's after the burglary by stating that the stock was gone as of May 6th.

Bucci's testimony concerning some of his actions on September 25, 1972 was disputed by agent Petrella. Petrella indicated that Bucci never mentioned, on the steps of the rectory, that he was seeking to interview LaPolla (Tr. 1418). Moreover, Petrella observed Bucci stop and engage Joost, Guillette and Marrapese in conversation after Bucci left the rectory (Tr. 1418), a fact Bucci falsely denied (Tr. 1314). Bucci also denied shoving Petrella that evening (Tr. 1313), a claim Agent Smith disputed (Tr. 159).

I.

The Evidence Was Sufficient to Sustain a Verdict of Guilty on each of the Three Counts.

In Count One the appellant and his three co-defendants were charged with conspiring to prevent Daniel LaPolla from exercising a civil right guaranteed to him by the Constitution and by federal law, that is, the right to testify in a federal court. LaPolla's death, it was charged, resulted from this conspiracy. The period of time covered by Count One stretched from May, 1972 through September 29, 1972 and the proof encompassed acts committed both in Connecticut and Rhode Island. Count Two charged the same individuals with an obstruction of justice on September 29, 1972 by using force and violence to intimidate LaPolla. That intimidation, of course, was his murder. Count Three charged the defendants with the illegal use of dynamite to carry out the crimes enumerated in Counts One and Two.

The proof at trial, taken in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60 (1942); *United States* v. *McCarthy,* 473 F.2d 300, 302 (2d Cir. 1972), established that on the morning of May 8, 1972, in Cranston, Rhode Island, the appellant and his three co-defendants agreed to kill Daniel LaPolla because the latter was strongly suspected of being a key witness against them in a federal criminal case in Connecticut involving stolen M-16's. On May 8, 1972 John Housand was hired, in appellant's presence, to kill LaPolla for the M-16 group. The government established through Housand's testimony that Zinni personally knew Housand and had told him, less than two weeks before and on the same premises, that he liked the way Housand handled himself with the police and had told Housand that "we can always use a good man". The government also established through appellant's own recorded conversation with LaPolla and

Marrapese on March 31, 1972, once again on the premises shared by A.U.G.B. and Carter's jewelry store, that Zinni participated in a plan to sell the stolen M-16's. This showed a particularly strong motive on his part to suspect LaPolla as a witness against him and a desire to eliminate him. After May 8, 1972, the government's proof of the murder plot was limited to acts of Joost, Guillette, Marrapese, and even Bucci, to locate LaPolla by unusual and extreme methods. The jury was certainly entitled, however, to conclude that LaPolla's murder resulted from the conspiracy. Only the four M-16 defendants had a motive to kill LaPolla, who was suspected of being a witness from the day the charges were filed, May 4, 1972. A tentative plan and a price of $5,000 to kill him was suggested within hours after release. Extensive efforts to locate LaPolla by shifting combinations of co-conspirators, including midnight surveillances, airplane rides, deceits, veiled threats to LaPolla relatives, a high speed automobile chase, a graveyard surveillance, and a flight down an alley to avoid federal agents were all probative of the conspiracy's first and most critical objective; location of the victim. The original means anticipated to carry out the murder—John Housand armed with a pistol—became unavailable. Although the object of the conspiracy never changed, the defendants were on notice as of September 25, 1972 that shooting LaPolla was not feasible since federal agents were seen surrounding the LaPolla family. On March 31, 1972, however, Marrapese had admitted to LaPolla in appellant's presence that "we" had dynamite. It was established that Guillette had the electrical expertise necessary to wire anti-intrusion devices such as burglar alarms. It was also established, through Roger Williams, the pilot, that Guillette and Joost knew that LaPolla periodically returned to his home in Oneco. The jury was well justified in concluding, as the M-16 defendants surely concluded, in late September, that a personal attack against LaPolla would fail whereas a booby-trap bomb could conceivably succeed.

Having once found a conspiracy, only slight evidence is necessary to connect the appellant to it. *United States* v. *Marrapese, supra; United States* v. *Knight*, 416 F.2d 1181, 1184 (9th Cir. 1969). The test is not the quantity of the evidence so much as the quality. Once the conspiracy was formed on the May 4 ride back to Providence, the direct proof against appellant is limited to his participation at the May 8th meeting. Mere attendance at a meeting or knowledge of a conspiratorial act, without more, may in some instances be sufficient to support an inference of active participation in a conspiracy. *United States* v. *Sisca*, 503 F.2d 1337, 1343 (2d Cir. 1974).; *United States* v. *Stewart*, 451 F.2d 1203 (2d Cir. 1971). In *United States* v. *Cirillo*, 499 F.2d 872, 884-887 (2d Cir. 1974) the Court described a situation where the presence of two defendants at a meeting with other defendants was insufficient to show infer criminality because there was "no evidence of what was discussed at the meetings, nor were they conducted in unusual places or under obviously suspicious circumstances". Cf, *United States* v. *Rizzuto*, 504 F.2d 419, 421 (2d Cir. 1974). Here there is direct evidence of appellant's consent to murder albeit a single act. A "single act," however, will draw the actor within the ambit of a conspiracy where the act indicates knowledge of the object of the conspiracy. *United States* v. *Torres*, 503 F.2d 1120, 1123 (2d Cir. 1974). In this case the purpose of the conspiracy was illegally adopted by Zinni. While the "single act" doctrine is itself clear, the appellate courts frequently wrestle with a conviction based on a single act of a co-conspirator in a large, multi-party, laminated conspiracy (frequently narcotics rings). The claim is usually made that the actor did not appreciate the fact that his act was a part of a larger criminal enterprise of which he had no knowledge. The courts have held that the nature of a solitary act will support a conviction if it clearly shows the actor's intent. In the appellant's case, his explicit acceptance of the murder contract was of sufficient nature and quality to bind him to subsequent acts of co-conspira-

tors reasonably necessary to effectuate the agreement. His acceptance was proven by direct eye-witness testimony. He may or may not have known of all of the intended acts of his co-conspirators in locating LaPolla but he remained bound by any acts in furtherance of the May agreement. *United States* v. *Salazar*, 485 F.2d 1272, 1276 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). It is hornbook law that "a conspiracy, once established, is presumed to continue until the contrary is shown". *United States* v. *Cianchetti*, 315 F.2d 584, 589 (2d Cir. 1963), citing *United States* v. *Stromberg*, 268 F.2d 256, 263-64 (2d Cir. 1959), *cert. denied*, 361 U.S. 863 (1959). Affirmative proof of withdrawal is generally required. *Cianchetti*, *supra*.

In a case such as this, where a small group of individuals agreed to a specific crime for a particular purpose, and where that purpose was murder, the success of the venture rested as much upon the unanimity of the parties as on the overt acts. Had the appellant withheld his consent on May 8, or indicated his disenchantment with the scheme thereafter to any co-conspirator, the conspiracy would have been seriously jeopardized. Appellant's initial consent, as found by the jury, therefore, was a positive and continuing encouragement to the efforts of Marrapese, Joost and Guillette to locate and kill LaPolla. It is true that appellant consented to a plan whereby Housand was to kill LaPolla but Housand's departure did not affect that consent. "The government [is] not limited to proving an agreement in which everyone's role and share was carefully fixed in advance, so that the slightest alteration in the arrangements would mean that the agreed venture had terminated." *United States* v. *Bennett*, 409 F.2d 888, 893 (2d Cir. 1969).

The proof against the appellant on Counts Two and Three stems from his involvement in the conspiracy from which the substantive offenses arose. This Circuit has had several recent occasions to reiterate the vitality of the

"Pinkerton rule", *United States* v. *Pinkerton,* 328 U.S. 640 (1946), that is, that a conspiracy and its underlying substantive offenses are separate and distinct, can be charged as such, and a conspirator is responsible for the ultimate commission of the substantive offense if the latter is the result of the conspiracy. *United States* v. *Mallah,* 503 F.2d 971, 981 (2d Cir. 1974); *United States* v. *Zane,* 495 F.2d 683, 697 (2d Cir. 1974); *United States* v. *Rizzuto, supra; United States* v. *Freeman,* 498 F.2d 569, 571 (2d Cir. 1974). The government was unable to prove, by direct evidence, that *any* of the four defendants placed the bomb inside LaPolla's residence or that any one of them was in Oneco on or about September 29, 1972. The government did prove, however, by direct and circumstantial evidence, that the defendants plotted to kill LaPolla and that his death resulted therefrom. Absent a showing of appellant's withdrawal he thus remained liable, as did his co-defendants, for LaPolla's murder.

Appellant also attacks the sufficiency of the evidence against him citing Housand's lack of credibility and the testimony of alibi witnesses. Individuals such as John Housand are not infrequent witnesses in cases of this type. *See, United States* v. *Pacelli,* 491 F.2d 1108 (2d Cir. 1974) and *United States* v. *Aloi,* — F.2d —(2d Cir.) Slip Opin. 1144 (January 31, 1975), to cite but two appropriate cases. Whether the jury chose to believe Housand or not was solely their function. The so-called alibi witnesses, moreover, failed to establish Bucci's whereabouts either before 10:00 a.m. or after jury selection began around 11:30 a.m. The shortness of the meeting at Carter's (15 minutes) and its nearby location (14 minute drive) gave the jury ample leeway to conclude that Bucci could have attended the meeting on May 8th. Bucci's statement that he remained in Providence Superior Court after the *Giorgi* jury was picked, when in fact Detective Fuina saw him abruptly depart the courtroom and disappear, and the defense's failure to call attorney John O'Neill (who was available)

to corroborate Bucci's whereabouts prior to 10:00 a.m., were facts the jury could also consider. That appellant's strategy of narrowing the contested issues in this case to the credibility of John Housand failed, vests appellant with no ground to complain on appeal. He had extensive opportunity to cross-examine Housand on his life of crime and prior inconsistent statements. Appellant vigorously attacked Housand in summation by describing his life since 1965 as one of lies, threats and crime (Tr. 1519). Counsel suggested that Housand lied "from the word 'go'" (Tr. 1521) and both sides exhaustively analyzed the conflicting testimony relating to the May 8th meeting. It is the jury's function, and should remain its function, to resolve this conflict.

II.

The Conversation of March 31, 1972 Relating to the Brooklyn Jail was Properly Admitted.

As previously described in the Statement of Facts, the government introduced into evidence tape recorded conversations of appellant, Marrapese and LaPolla which occurred on A.U.G.B. premises on March 31, 1972.[9] The recorded remarks fall into two categories; a discussion of the stolen M-16's,[10] and a discussion about using dynamite to blow up the Brooklyn Jail.[11] The "M-16" remarks were clearly admissible against appellant and Marrapese on several grounds, to show their criminal involvement in the enterprise that led to the conspiracy, *United States* v. *Del Purgatoris*, 411 F.2d 84, 86 (2d Cir. 1969), to show their

[9] The government introduced only portions of the 90 minute conversation. The court informed the defense it was free to offer any of the remaining conversation (Tr. 250), an invitation they declined.

[10] The transcript of the "M-16" remarks was set out in full by this Court in *United States* v. *Marrapese, supra.*

[11] The transcript of the "Brooklyn" remarks is set out in appellant's Brief, p. 34.

knowledge that LaPolla was involved with them in the M-16 offense and was thus a potential witness against them, and to show a motive to kill LaPolla. "Considerable latitude is admissible on the question of motive."[12] *Moore* v. *United States*, 150 U.S. 57, 61 (1893).

Appellant strongly attacks the admissibility of the "Brooklyn" conversation, claiming that a conversation between Marrapese and LaPolla to blow up the Brooklyn Jail was so prejudicial as to deny him a fair trial. While Zinni did not speak during the "Brooklyn" conversation he was present, having participated in the M-16 conversation minutes before and having asked for a cup of coffee seconds after Marrapese said, "We got eight sticks (unclear), I'm going to take him off (banging sound). That's what you'll hear, Dan". It should be noted at the outset that this conversation was with the very man the conspirators later killed and occurred in the same conversation where the stolen M-16's were discussed. There are strong reasons why the "Brooklyn" conversation was admissible. It placed one of the conspirators (Marrapese) in the possession of eight sticks of dynamite with the readiness and "know-how" to use it in a bomb. Dynamite is not a common item to which the public has ready access. Use of dynamite in the construction of the device which killed LaPolla was a dangerous task which a government expert testified was

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[12] *See United States* v. *Knohl*, 379 F.2d 427, 438-39 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967) (evidence defendant large scale dealer in stolen securities relevant to show motive to persuade grand jury witness to lie in obstruction of justice case); *United States* v. *Puff*, 211 F.2d 171 (2d Cir.), *cert. denied*, 347 U.S. 963 (1954) (evidence defendant had robbed a bank in Kansas eight months prior to shooting an FBI agent trying to arrest him in New York City admissible to show motive for the shooting which in turn bore upon premeditation and self-defense); *United States* v. *Marchisio*, 344 F.2d 653, 667 (2d Cir. 1964); *United States* v. *Houlihan*, 332 F.2d 8, 14-15 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964); 2 Wigmore, Evidence § 390 (3d ed. 1940) (motive for murder).

inadvisable for a neophyte (Tr. 83). To prove, by circumstantial evidence, that the M-16 defendants killed LaPolla, since he was killed by dynamite the government was all but obligated to show that one or more of them had access to dynamite and the expertise to use it. Both Marrapese and Guillette had this access and Guillette had the electrical expertise. Marrapese's admission to LaPolla, of all persons, that he wanted to kill a witness with a bomb was highly relevant. Moreover, this tape recording was provided, as disclosure in the M-16 case, to the M-16 defendants prior to LaPolla's death. The appellant and Marrapese therefore had reason to believe LaPolla could also testify against them both with respect to the "Brooklyn" conversation and to the M-16 case, which substantially increased their motive to kill him. Evidence of other crimes, in this case a discussion of a planned crime, is admissible for any relevant purpose other than to show the appellant's bad character or where prejudice outweighs the relevancy *United States* v. *Papadakis*, — F.2d — (2d Cir. 1975), Slip Opin. Nos. 264, 275 (2d Cir. 1975); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966). This Court said in *Papadakis*, *supra*:

> "During the past few decades, the exceptions allowing admission of proof of prior criminal acts have grown in number to the point that they have engulfed the rule. Despite the efforts of defense lawyers to stem the tide, the flow has been constant . . . Thus, we are by now firmly wedded to the inclusionary form of the rule that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character" (citations omitted).

We are not faced in this case with a situation where the prior conversation is completely unrelated to the crime charged, which is usually the starting point in "other

crimes" discussions. The "Brooklyn" conversation was part and parcel of the M-16 conversation with the victim himself. It was the last time the appellant or Marrapese ever spoke to LaPolla. It was a conversation they knew he had helped record for federal authorities. It concerned dynamite and the location and elimination of a witness. It showed motive and was, therefore, highly relevant, particularly since the method discussed was the method ultimately used to consummate the conspiracy.

III.

Appellant Has No Standing to Challenge Search Warrants Directed Against the Vehicle and Residence of Co-defendant David Guillette.

On December 11, 1972, A.T.F. Special Agent Richard Weronik secured a warrant in Hartford, Connecticut to search and seize evidence from David Guillette's vehicle relating to a bombing at the Noblemet Refinery in Burrillville, Rhode Island on April 15, 1972. On March 20, 1973 Weronik secured a warrant for Guillette's residence seeking evidence of the same crime. Appellant does not claim any proprietary interest, nor did he have any, in either Guillette's vehicle or residence. He was not present at either search. Both searches revealed that Guillette had electrical expertise, a fact independently established by Weronik at trial as a result of his plain view observation of Guillette's basement workshop on May 4, 1972 (Tr. 58). During the search of March 20, a handwritten document of John Housand and a typewritten "affidavit" signed by Housand were seized in addition to electrical paraphernalia and a piece of hemlock wood. Of all the items seen, observed or seized, none were introduced at appellant's trial except receipts for purchases of electrical items and a reference that the piece of hemlock seized at Guillette's residence was the same type of wood used in the LaPolla

bomb. In his Brief,[13] appellant baldly asserts standing under *Jones* v. *United States*, 362 U.S. 261 (1959), but does not discuss whatsoever the theory under which *Jones, supra,* should apply herein. Appellant also claims that Housand's testimony should be suppressed as the fruit of an unlawful search on March 20, 1973.[14]

It is well established that "co-conspirators and co-defendants have been accorded no special standing". *Alderman* v. *United States*, 394 U.S. 165, 172 (1969). To establish standing the appellant must show not that damaging evidence was introduced against him, but rather that his personal rights were violated. *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1205 (2d Cir. 1973). Appellant had no constitutional interest in protecting the privacy of Guillette's vehicle or his residence as he had no possessory interest in either. *Pui Kan Lam, supra,* at p. 1206; Cf. *Alderman, supra,* at pp. 176-180.

In *Jones, supra,* the Supreme Court gave automatic standing in possessory crimes, i.e. where the nature of the charge is illegal possession of an item so that seizure of the item, albeit from someone else's premises, is proof of the possession. Cases which commonly raise this problem, of course, involve narcotics or stolen goods. By no stretch of the imagination can appellant contend that the receipts or the reference to the piece of wood were evidence illegally seized from him. Nor was appellant a "target" of the searches of Guillette's vehicle and residence. Those searches sought evidence of a totally independent crime. Thus, while this Court has had occasion to discuss without deciding whether *Jones*, is to be broadened to provide standing to

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[13] At p. 57.

[14] Prior to the Joost/Guillette trial in October, 1973, Judge Clarie upheld both searches. A copy of the search warrants, the parties' briefs and relevant documents may be found in *United States* v. *Guillette*, Docket No. 74-1333 (District of Connecticut).

persons against whom the search is directed,[15] it is clear that appellant was not such a target. Moreover, automatic standing in *Jones*, has been limited by the Supreme Court in *Brown* v. *United States*, 411 U.S. 223, 229 (1973). This court has recently held that a defendant not in physical possession of seized goods has the burden of proving that he had a possessory interest *Capra*, 501 F.2d 267, 273 (2d Cir. 1974).

With respect to Housand's testimony, Special Agent Petrella testified[16] that within a week after LaPolla's death, Housand *was scheduled to be interviewed as a suspect.* He was already known to the agents as an associate of Joost and Guillette since he was observed by the agents with Joost and Guillette at their arraignment on the M-16 charges on May 4, 1972. Appellant has made no showing that Housand's testimony was induced by evidence seized from Guillette. Compare *Smith and Bowden* v. *United States*, 324 F.2d 879 (D.C. Cir. 1963) and *Smith* v. *United States*, 344 F.2d 545, 547 (D.C. Cir. 1965) with *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964). *See also, United States* v. *Bacall*, 443 F.2d 1050, 1056-57 (9th Cir. 1971); *United States* v. *Nagelberg*, 434 F.2d 585, 587 (2d Cir. 1970) (independent source to identity of witness).

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[15] *United States* v. *Mapp*, 476 F.2d 67, 71 (2d Cir. 1973).

[16] At the suppression hearing before Judge Clarie prior to the Joost/Guillette trial. The transcripts are on file before this Court in *United States* v. *Guillette*, Docket Nos. 74-1333. See Petrella's testimony, Suppression Hearing, p. 245-246.

IV.

Section 241, Title 18, United States Code Confers Jurisdiction Upon Federal District Courts for the Conspiracy Murder of a Federal Witness.

In *United States* v. *Pacelli, supra,* this Circuit held that a conspiracy resulting in death of a federal witness, designed and carried out to prevent the witness from testifying in a federal court, was an offense punishable by Section 241. Since there can be no doubt as to the status of the law of this point in this Circuit, this claim should be rejected.

V.

The Appellant was Indicted by a Fair and Impartial Grand Jury.

Appellant claims he was denied an impartial grand jury because the same grand jury which heard LaPolla testify in the M-16 case also returned the indictment charging a conspiracy to kill him. He has not shown any actual bias. In effect, he alleges that the grand jury *must* have been biased when it considered the indictment in this case because it had earlier heard LaPolla testify.

The right to a fair and unbiased grand jury is not challenged. *Costello* v. *United States,* 350 U.S. 359 (1956); *United States* v. *Aviles,* 274 F.2d 179, 191 (2d Cir. 1960), *cert. denied, Evola* v. *United States,* 362 U.S. 974 (1960). Equally settled is the principle that an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. *United States* v. *Calandra,* 414 U.S. 338 (1974), citing *Costello, supra.*

A grand jury's role, generically different than that of a petit jury, is not subject to the objections of irrelevancy or incompetency which counsel have available at trial. *Calandra, supra,* at p. 345. A full scale hearing into what may have been in the minds of the grand jurors would not only result in protracted delays and disruptions of the grand jury process such as condemned in *Gelbard* v. *United States,* 408 U.S. 41, 70 (1972), but would also expose the grand jurors to public examination of their proceedings without the slightest indication that any impropriety occurred. Indeed, after conviction, Joost and Guillette filed a motion with this Court to examine the grand jury testimony of Daniel LaPolla, in order to determine if LaPolla expressed a fear of the defendants to the same grand jury which indicted his murderers. On May 22, 1974, Joost and Guillette withdrew that motion because of voluntary compliance by the government. Significantly, the appellant does not allege any improper remarks by LaPolla, or the government, to the grand jury which would have inflamed them when considering the bomb case. He does not allege that the grand jury was presented with any evidence designed to induce the grand jury to act out of emotion rather than reason. Moreover, it would appear that this grand jury was in a unique position to find probable cause that LaPolla was a federal witness, an element of each charge, and that the M-16 defendants had the strongest motive to keep him from testifying. In *United States* v. *Estepa,* 471 F.2d 1132 (2d Cir. 1972) this Court condemned the unnecessary use of hearsay before a grand jury, particularly where the grand jury believes it is hearing eyewitness testimony. While LaPolla's murder certainly would have constituted permissible and extraordinary grounds for using hearsay testimony relating to his status as a witness and his relationship to all four defendants, the presentation of this case to the sitting grand jury insured the fullest investigation possible under the circumstances since it already had LaPolla's eyewitness account of the offense which gave the conspirators the obvious and compelling motive to eliminate

him. "The grand jury investigative power must be broad if its public responsibility is adequately to be discharged". *Calandra, supra,* at p. 344. The grand jury began its work in 1972 before it ever heard of LaPolla; there is no showing whatsoever that any of the grand jurors knew LaPolla or the appellants personally or ever learned anything about this case outside the grand jury room. In fact, even if the grand jurors *had* learned of evidence through rumors, tips or personal knowledge, they were free to act. *Costello, supra,* at p. 362.

VI.

The Appellant was not Entitled to a Severance.

Appellant contends that denial of his motion for severance denied him a fair trial for four reasons: a) the government actually proved two conspiracies; b) Marrapese could have provided exculpatory testimony on behalf of appellant were he not a co-defendant; c) appellant and Marrapese had inconsistent defenses; d) evidence against Marrapese about planning the "Brooklyn" bombing was inflammatory as against Zinni.[17]

Although appellant divides his argument into four categories, "a", "c", and "d" are actually intertwined. If one assumes that two conspiracies were actually proved *and* that the two defendants had antagonistic defenses *and* that Marrapese's remarks about the Brooklyn Jail did not relate to evidence against appellant in "either" conspiracy, then appellant's argument could be properly subdivided. Appellant ignores, however, that the government submitted *all* of its evidence against both defendants as probative of one conspiracy to kill LaPolla. The government did not

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[17] We start with the principle that trial judges possess broad discretion in granting motions to sever under Rule 14, Fed. R. Crim. P. *United States* v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1972).

charge the defendants with conspiring to bomb LaPolla. It charged the M-16 defendants with conspiring to prevent LaPolla from testifying which *ultimately* resulted in his death by dynamite. The scheme was to kill a particular person by or on behalf of the M-16 defendants. Where two or more defendants on trial are shown, as here, to have participated in a common criminal scheme, no prejudice results. *Cassino, supra*, at p. 622. When Zinni agreed that LaPolla was to be killed once he had been located he became bound by the acts of his co-conspirators in locating LaPolla. *Salazar, supra* at p. 1276. The Government in its summation anticipated that the defense would argue that a separate conspiracy to kill LaPolla resulted once Housand left Rhode Island (Tr. 1477). No evidence was introduced to show, however, that the remaining participants withdrew from the conspiracy or changed its objective. "Where, after formation of a conspiracy, one of the conspirators withdraws, such withdrawal neither creates a new conspiracy, nor changes the status of the remaining members." *Marino* v. *United States*, 91 F.2d 691, 696 (9th Cir. 1937), *cert. denied*, 302 U.S. 764 (1938). A change of membership (the departure of Housand) or a time gap in the proof does not destroy the existence of a single continuing conspiracy. *United States* v. *Stromberg, supra*. The fact that the testimony and physical evidence was greater against other co-conspirators did not entitle appellant to a severance.

> "The general credibility of a prosecution witness may be strengthened in any case where he offers testimony against two defendants and the physical evidence against one defendant is overwhelming. Indeed, this type of support of a prosecution witness may happen in any joint trial where the evidence against one defendant is for any reason much stronger than the evidence against another." *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971).

The record is void of any indication, moreover, that the additional evidence against Marrapese resulted in inconsistent defenses. The defense, in truth, was highly united. Both defendants sought to show through the same witnesses that no meeting on May 8, 1972 occurred. Marrapese attempted to show that his acts subsequent to May 8th were innocent in nature, which certainly did no harm to appellant's case. Zinni's former attorney, John A. O'Neill, who represented Zinni on the M-16 trial and in many proceedings prior to trial in this case, continued in the case as Marrapese's co-counsel. No witness called by Marrapese inculpated Zinni or even remotely suggested that appellant's defense conflicted with Marrapese's. A severance would only have reduced the number of people at the defense table; it would not have reduced, increased or altered the evidence.[18] And, as previously discussed in the Statement of Facts and in Point I, Marrapese's comments about the Brooklyn Jail wherein he said "*we* got eight sticks" to LaPolla seconds before Zinni's voice reappeared in the conversation was proper to show that one or more of the co-conspirators had access to dynamite. The jury could well find that Marrapese's use of "we . . ." ("got eight sticks") referred to appellant, who was periodically a party to the overall conversation to include remarks about the M-16s.

Appellant also contends that a severance would have allowed him to call Marrapese as a witness. As background, Marrapese testified in the M-16 trial that Zinni's voice was not present on the March 31st recording. Zinni did not testify at that trial. The jury disagreed by convicting him. On September 10, 1973, Marrapese gave an oral statement to A.T.F. agents shortly before trial was sched-

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[18] "Reasons for severance are founded on the principle that evidence against one person may not be used against a co-defendant *whose crime is unrelated to the others.*" *Schaffer* v. *United States*, 362 U.S. 511, 523 (1960) (Douglas, J., dissenting) (emphasis supplied).

uled to begin in the murder case. In his statement[19] Marrapese denied any meeting of May 8th and attempted to shift the blame primarily to Guillette and somewhat to Joost. He also described Zinni's involvement in transporting the M-16s from Rhode Island to Connecticut and confessed to extensive perjury at the gun trial. The government considered his September statement to be so unreliable that it did not even attempt to introduce it against Marrapese in the murder case to show his guilt in the gun case, or to prove his attempts to locate LaPolla and his admitted possession of dynamite. Appellant's claim that both Marrapese's gun trial testimony *and* his September statement is specious since the latter shows the former to be perjurious and establishes appellant's strong motive to kill LaPolla. Of more direct importance is that there is no showing that at a separate trial Marrapese would testify for Zinni. *United States* v. *Noah,* 475 F.2d 688, 696 (9th Cir. 1973); *United States* v. *Thomas,* 453 F.2d 141, 144 (9th Cir. 1971), *cert. denied,* 405 U.S. 975 (1972). Marrapese in fact was called by Joost at the latter's murder trial and vigorously invoked his Fifth Amendment privilege to all questions. The complete failure of appellant to call Marrapese as a witness, or attempt to do so outside the jury's presence, indicates either that appellant knew Marrapese would not testify or that both defendants were in common agreement that their joint attack on Housand's credibility had been sufficient. Appellant knew, beyond peradventure that if he called Marrapese the latter would be forced at the very minimum to inculpate him in the gun charges. Marrapese's denial in September, 1973 that he attended the May 8th meeting would only have been cumulative in appellant's trial since Bucci testified that *he* attended no such meeting. Appellant got the best of the bargain because he utilized the testimony of an attorney with no prior criminal record to deny the meeting. If Marrapese, a thrice convicted felon with a prior history of false exculpatory statements, had been called to give the same testimony, it would have carried less weight.

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[19] A copy of which can be found in the appendix of Joost and Guillette, Docket No. 74-1333, at p. 105-134.

VII.

The Trial Court's Response to Two Jury Questions Were Fair and Correct.

At 4:42 p.m. on June 11, 1974 the jury sent a note to Judge Murphy asking, "Is it possible to find one defendant guilty of conspiracy resulting in death and the other guilty of conspiracy not resulting in death (Tr. 1684). Judge Murphy answered, "Yes", a response to which appellant had no objection (Tr. 1684). At 10:15 a.m. the following day, the jury asked to have the conspiracy charge reread and asked, "Question. Is it possible under that definition of conspiracy for one conspirator, once a conspiracy has been formed to cease to be a member of that conspiracy without a new conspiracy being formed?" (Tr. 1691). Judge Murphy asked counsel for their views in chambers (Tr. 1691) which resulted in a discussion of withdrawal. Defense counsel for Marrapese and government counsel felt that there had to be an affirmative act of withdrawal and the jury was so directed. Appellant requested the Court to simply respond "Yes". The Court reread his charge to the jury on conspiracy and then read from *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), stating that a defense of withdrawal is rigorous (Tr. 1707) and reading:

> "Mere cessation of activity is not enough to start the running of the statute. There must be affirmative action, either the making of a clean breast to the authorities . . . or communication of the abandonment in a manner reasonably calculated to reach co-conspirators. And the burden of establishing withdrawal lies on the defendant".

Judge Murphy further added (Tr. 1708), that "there was no evidence in the case of any new conspiracy being formed assuming that you find that a conspiracy was formed previously." Appellant contends that Judge Murphy's an-

swers to the questions in effect told the jury first that it could find two conspiracies and then that it could not. Appellant misconstrues the nature of the second question. He was only too happy to join in the Court's answer to the first question since it could be reasonably inferred from the evidence that the jury considered the case to be stronger against Marrapese with respect to LaPolla's death. The Court's answer to Question #1 did not suggest to the jury that it would have to find two separate conspiracies to convict one defendant of conspiracy with death resulting and the other defendant of conspiracy without death resulting. As the finder of fact it could find one continuous conspiracy through September 29, 1972, but find that Zinni was no longer a member of the conspiracy when death resulted. The jury's second question merely asked if a new conspiracy results merely by the withdrawal of one conspirator. This question could only refer to Housand, who testified that he was in jail by September 29, 1972. The Court noted that if the jury found that a conspiracy existed, it could only find withdrawal under rigorous conditions. Mere cessation of activity is not enough. Affirmative action was needed. *Borelli, supra.* The Court added, correctly, that in this case there was no affirmative act of withdrawal in the alleged conspiracy. The only evidence which even raised the *possibility* of withdrawal was Housand's imprisonment. Imprisonment, however, does not constitute withdrawal. *Borelli*, at p. 389. The Court's two answers therefore, were entirely consistent. Appellant merely sees an opportunity to take advantage of an affirmative defense which, for good reason, he never advanced.[20]

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[20] The defense attempted to show through alibi witnesses that no conspiracy was ever formed. Hence, under their theory, there was nothing from which to withdraw.

VIII.

The Appellant was not Entitled to a New Trial on the Ground of alleged Suppression of a Fingerprint Expert's Report.

Shortly after his conviction on June 13, 1974 appellant and co-defendant Marrapese filed a motion for a new trial alleging that the government wilfully suppressed an expert report dated October 3, 1972 and an expert report dated June 18, 1974, four days *after* the jury's verdict. Judge Murphy held an evidentiary hearing on September 5 and 6, 1974 and on October 22, 1974 filed an eleven page opinion, almost wholly a finding of facts, denying the motion.[21]

It will be recalled that James E. McDonald, a Connecticut State Police fingerprint analyst, testified at appellant's trial that latent partial fingerprints found on components of the bomb's triggering mechanism did not belong to Marrapese and Zinni (Tr. 800). McDonald reached this conclusion by printing both defendants during a recess in the trial. The background of this development began on September 30, 1972.

The day after LaPolla's death, A.T.F. agents found bomb components on the scene, including a 6-volt Ray-O-Vac battery and some electrical tape (MNT: 362). A.T.F. Special Agent Richard Weronik, the evidence custodian, co-ordinated examination of the battery with Sgt. McDonald that same day (MNT: 12). McDonald announced that there were partial latent prints on the battery (MNT: 13). McDonald claims that sometime between September 29 and October 12, 1972 he told Agent Weronik that the latent partials were "identifiable" (MNT: 193), i.e., that there were enough points of identification visible to make a

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[21] References to the testimony on the motion for new trial will be "MNT:"; references to Judge Murphy's ruling will be "Ruling:".

comparison with known fingerprints. Although McDonald recalled clearly[22] that he told Agent Weronik, and other A.T.F. agents (MNT: 183), that the latent partials were "identifiable", Agent Weronik testified that McDonald did not use the word "identifiable" (MNT: 24), but only that the partials were such that he could work with them (MNT: 57). On October 3, 1972 McDonald drafted a report which stated that three latent partials were identifiable and which requested that "major" printing of suspects be done, i.e., that printing of the full hand be done because the partials appeared to be from the sides of the finger. Sgt. McDonald admitted that he never showed this report to anyone (MNT: 191) until he testified at appellant's trial (Tr. 204). The Connecticut State Trooper in charge of the state's investigation, John Burke, never saw the report (MNT: 367), nor was he ever told by McDonald that the prints were identifiable (MNT: 367), which contradicted McDonald's (MNT: 221). The attorney in charge of the state's prosecution, Harry Gaucher, was also unaware of McDonald's report (MNT: 169). In fact, one of Burke's reports attributed to McDonald a conclusion that the prints were unidentifiable (MNT: 171). On October 12, 1972 the four M-16 defendants and Edward Sitko were fingerprinted at the Hartford federal building pursuant to a grand jury request and a court order. The fingerprints were taken by Anthony Varcos, an A.T.F. fingerprint expert (MNT: 285). McDonald was also in attendance (MNT: 198). Although McDonald now had the fingerprint cards of the suspects, as well as the latent partials, he was slow in reaching a conclusion (MNT: 33). As a result, Varcos was called in to assist (MNT: 34). Varcos went to McDonald's office for a conference only to learn that McDonald was on vacation. After spending three full days inspecting McDonald's

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[22] McDonald also testified, unequivocally, on four occasions (MNT: 171-180, 221, 255, 251) that he reached his conclusions on the fingerprints the very first time he arrived at the crime scene, September 29, 1972. In fact, the battery and tape were not even found until a day later (MNT: 362).

file, which included the fingerprint cards and the latent partials, Varcos concluded, in a report dated November 15, 1972, that the latent partials were "unidentifiable" (MNT: 300). This report was provided to all of the defendants. The government was unaware of McDonald's report of October 3, 1972 and concluded that Varcos' report reflected the joint opinion of both fingerprint men (MNT: 109). McDonald testified that he told the federal prosecutor, Coffey, that the prints were identifiable (MNT: 248), although he later stated that he *assumed* Coffey knew the prints were identifiable by October 12, 1972 based on prior discussions (MNT: 257). Coffey did not recall McDonald's use of the word of art "identifiable" (MNT: 95), and was unaware of McDonald's difference of opinion with Varcos until shortly before the former testified in June, 1974 (MNT: 102). On or about October 3, 1973, McDonald received a letter from Hubert Santos, David Guillette's attorney. The letter requested duplicate copies of the fingerprint cards and of the latent partials (MNT: 213). Mr. Santos received copies of both soon thereafter (MNT: 340-341). McDonald testified that in a telephone conversation prior to October 3, 1973 he told Santos that the latent partials were identifiable (MNT: 264), a claim which Mr. Santos disputed (MNT: 333). At one point Santos testified that when he received the fingerprint cards *of all the defendants* and copies of the latent partials he was not acting as an agent of Marrapese and Zinni, but only for Joost and Guillette (MNT: 354). He then indicated that attorneys for Marrapese and Zinni were coordinating the "May 8th alibi" aspect of the defense, whereas he and Mr. James E. Wade, Joost's attorney, were coordinating the "physical evidence" aspect of the case (MNT: 355). The court found this testimony to be "a little inconsistent" (MNT: 356). Mr. Santos denied accepting the fingerprint evidence from the government on behalf of the appellant (MNT: 358), but did not concede that his office was in frequent contact with appellant's counsel (MNT: 352).

He stated that if the defense had known of McDonald's conclusion prior to the Joost-Guillette trial the fingerprints would have been submitted to every expert "we" could find (MNT: 334).[23] Mr. Santos admitted that he knew that fingerprints were a physical characteristic not afforded Fourth or Fifth Amendment protection (MNT: 339). He admitted that he, as with all the defendants, had subpoena power (MNT: 340) to secure fingerprinting of the four defendants and, of course, he had conceded previously that he was given all of the physical evidence available to McDonald and Varcos. When asked if the defense had employed a fingerprint expert upon receiving this evidence, Mr. Santos declined to answer, asserting the attorney-client privilege (MNT: 342). It was not until Judge Murphy filed his opinion on October 22, 1974 that the government learned that the defense had indeed hired its own expert.[24] Although the government does not know, even now, what conclusion that expert reached, the mere fact that his services were employed uncovers the hollowness of the whole issue.[25]

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[23] In his Brief on the denial of the motion for a new trial, at p. 21, appellant contends that he never received the information given by McDonald to Mr. Santos. This claim is incredible. Not only was the defense a joint effort until a severance was granted in mid-October, 1973, but John A. O'Neill, who was then appellant's attorney, continued on the case involving the appellant as Marrapese's attorney. All the attorneys knew that fingerprints had been found, a point conceded by appellant. McDonald testified "absolutely" that he told Marrapese, when he printed him on October 12, 1972, that the latent prints were identifiable (MNT: 271). Significantly, O'Neill did not testify at the motion for new trial, although he was present throughout. Judge Murphy could reasonably infer that he informed appellant of Santos' information.

[24] Ruling, p. 7.

[25] If the expert has concluded that the latent partials were "identifiable" then the defense could have fingerprinted their clients and present their findings, if favorable, to the jury. If the expert has concluded that the latent partials are not identifiable, this corroborates Varcos, the government expert who still feels the prints are unidentifiable.

During appellant's trial, the defense elicited several references from government witnesses that fingerprints had been found by McDonald (MNT: 102). Although Varcos had concluded that the latent partials were unidentifiable, the government decided to call McDonald, since his name had already been mentioned, to give a conclusion which the government anticipated would coincide with Varcos' (MNT: 102). Upon learning from McDonald, an hour before his appearance on the stand, that he did not agree with Varcos, the government called McDonald immediately and elicited that fact, provided McDonald's report of October 3, 1972, and agreed to have him fingerprint Marrapese and Zinni (See MNT: 102). Appellant had, and put to great use at trial, the very report he claims the government wilfully suppressed (Ruling, p. 5). He received the benefit of McDonald's testimony that the latent partials did not belong to him.[26]

Shortly after appellant's trial, the prosecution ordered McDonald and Varcos to get together to determine if their opinions were reconcilable (MNT: 97). After a conference, McDonald stuck to his opinion, but refused to file a report (MNT: 237). Varcos filed a report, dated June 18, 1974 in which he concluded that the latent partials were still unidentifiable (MNT: 306), a position McDonald respected (MNT: 223). According to Varcos, the only latent partial that he would consider to be identifiable is actually two separate prints that are superimposed (MNT: 306). McDonald agreed that if Varcos is correct, that there is an overlap, then the print is unidentifiable (MNT: 223). Varcos' report of June 18 stated, in paragraph 2, that sufficient number of characteristics on the latent partial make identification possible, but he goes on to say that the

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[26] McDonald has subsequently concluded that the latent partials do not belong to Joost or Guillette either. On October 25, 1974, Judge Murphy denied a subsequent motion for new trial which appellant based on this additional conclusion.

latent print "*in question*" is in fact a combination of two separate areas. In paragraph four he stated that comparison between the known fingerprints and the partial latents was "negative". Varcos testified that the first part of paragraph two reflected McDonald's opinion whereas the last sentence in that paragraph reflected his own opinion (MNT: 306-307). He also testified that the term "negative results" was a term of art in the fingerprint profession meaning that no conclusion could be reached one way or the other (MNT: 308). Appellant, in his motion for new trial, misinterpreted Varcos' report thinking that he had concluded that none of the suspects' fingerprints were on the bomb. As a result, appellant claimed that the government wilfully suppressed Varcos' report of June 18 because it showed that the appellant did not handle the bomb.

Judge Murphy's ruling of October 22, 1972 stated that "the defendants produced not one iota of proof to support their charges of flagitious Government conduct". (Ruling, p. 4). He found, as fact, that:

> a. the government disclosed Varcos' report well in advance of trial (Ruling, p. 6), and McDonald's report of October 3, 1972 on the day he testified (Ruling, p. 5).
>
> b. McDonald's testimony was to be taken with hesitancy and suspicion (Ruling, p. 5) and stated the reasons therefor.
>
> c. the government did not know of McDonald's report, or of his conclusion, until the morning McDonald testified (Ruling, p. 5).
>
> d. Mr. Santos was told by McDonald that the latent partials were identifiable (Ruling, p. 7), and that Mr. Santos was acting as the agent for all of the defendants (Ruling, pp. 7-8).
>
> e. Agent Varcos' explanation of his examination of the latent partials in June, 1974, and his explanation of his report, was acceptable (Ruling, p. 11).

Judge Murphy also concluded that all of the testimony and argument about the word "identifiable" in the light of the facts, was nothing but a "great deal of blather" (Ruling, p. 6). Indeed, the defense was so lacking in establishing a factual basis that Judge Murphy felt no need to discuss the law. A motion for new trial is generally not favored by the courts and is viewed with great caution. *United States* v. *Lombardozzi*, 343 F.2d 127, 128 (2d Cir. 1965), *cert. denied*, 381 U.S. 938; *United States* v. *Catalano*, 491 F.2d 268, 274 (2d Cir. 1974); *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir. 1958), *cert. denied*, 357 U.S. 937 (1958). The findings of fact by Judge Murphy are to be sustained unless "wholly unsupported by the evidence". *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946);[27] *United States* v. *Pfingst*, 490 F.2d 262, 273 (2d Cir. 1973), *cert. denied*, 94 S. Ct. 2625 (1974). Where the trial court takes the care to provide an evidentiary hearing, even though appellant is not entitled to one as of right, *United States* v. *Houle*, 490 F.2d 167 (2d Cir. 1973), *cert. denied*, 94 S. Ct. 3174 (1974), the findings of the court are of particular weight where there is conflicting testimony affecting the credibility of witnesses. *Pfingst*, *supra*, at p. 273.

In his Brief, at pp. 26-28 appellant sets out at length the standard *Brady* rule[28] and this Circuit's *Keogh* test.[29] With these cases the government, of course, has no argument. It is clear, therefore, that under *Brady* the govern-

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[27] Appellant does not state in his papers that his motions for a new trial were filed pursuant to Rule 33, F. R. Cr. P. Since he claims he has newly discovered evidence and/or has shown prosecutorial misconduct, and, given the posture of the case on appeal, it would appear that the standard of review in *Johnson*, *supra*, should apply. Even if appellant were to contend that the standard under 28 U.S.C. 2255 should apply, he would have to show that Judge Murphy's findings were "clearly erroneous". *Pfingst*, *supra*, at p. 273. The test under Rule 33 is stricter. *Id.*

[28] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[29] *United States* v. *Keogh*, 391 F.2d 138, 146-147 (2d Cir. 1968).

ment must disclose evidence favorable to the defense that is material either to guilt or punishment. It is also clear under *Keogh* that as the level of prosecutorial misconduct, if proven, rises, the necessity to show prejudice diminishes. Under either case, however, there must first be a nondisclosure. The fallacy of appellant's entire argument lies in the fact that he obtained McDonald's testimony and report at trial and put both to valuable use.[30] He not only had everything the government had in this regard; he had *more*. Judge Murphy found that McDonald told the defense, but not the prosecution, of his opinion long before trial. Moreover, prior to trial, the defense secured the services of an independent expert, a fact which appellant did not call either to the court's or the prosecution's attention when he argued eloquently how he was denied the information which would have allowed him to do just that. His Brief on the Motion For New Trial is utterly lacking in any effect to inform this Court that the defense had its own fingerprint expert prior to trial.

Judge Murphy was well justified in finding that appellant's post-trial motions were wholly without merit.

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[30] Where a defendant has knowledge of evidence he alleges was suppressed by the government, through a witness common to both, there is no suppression. *United States* v. *Fabric Garment Co., Inc.*, 262 F.2d 631, 642 (2d Cir. 1958), *cert. denied*, 359 U.S. 989 (1959).

CONCLUSION

Appellant was provided a fair and complete trial. He had a full preview of the government's case in the trial against co-defendants Joost and Guillette and elected to reduce the contested issues at his trial to a fight over John Housand's credibility. He cannot now complain that the jury chose to accept the government's version of the offense.

Respectfully submitted,

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U.S. Department of Justice

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1941

UNITED STATES OF AMERICA

Appellee

v.

NICHOLAS ZINNI

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Louis Pinto, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71st Street Brooklyn, N.Y.

That on the 10th day of March, 1975, deponent served the within Brief for the Appellee upon C. Thomas Zinni, Esq. 53 Mount Vernon Street ; Boston, Mass. 02108 T. George Gilinsky, Chief, Appellate Section, Criminal Division Washington, D.C.

Attorney(s) for the _____ in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

This 10th day of March 1975

Louis Pinto

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1975